In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE; CALIFORNIA INDUSTRIAL WELFARE COMMISSION,
Petitioners,

vs.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeals
for the Ninth Circuit

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Petitioners,

VS.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeals
for the Ninth Circuit

The State of California, Department of Industrial Relations, Division of Industrial Welfare and the California Industrial Welfare Commission pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 31, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is appended to this petition as Appendix A. The opinion of the United States District Court for the Northern District of California is reported at 356 F.Supp. 1111 (N.D. Cal. 1973) and is appended to this petition as Appendix B.

JURISDICTION

Plaintiff-respondent Homemakers, Inc., of Los Angeles, sought declaratory and injunctive relief under 42 U.S.C. section 2000e, 28 U.S.C. sections 1331 and 1334 and 29 U.S.C. section 201. Jurisdiction was further invoked under Article III, clause 2, of the United States Constitution.

Following judgment by the District Court, an appeal was presented to the Court of Appeals for the Ninth Circuit. The Court of Appeals rendered judgment on December 31, 1974. No petition for rehearing was filed.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1254(1) to review the decision of the Court of Appeals on issues of the utmost importance to millions of California employees.

QUESTIONS PRESENTED

1. Is a state statute expressly requiring a premium wage rate for work during overtime hours for female employees valid under Title VII of the Civil

Rights Act of 1964 when a complementary State Equal Pay Act requires that an employer nondiscriminatorily extend the premium wage rate to both its male and female employees?

2. Does the goal of eliminating sex discrimination mandated by Title VII and the Federal Equal Pay Act require this Court to interpret California Labor Code section 1350.5 and California Industrial Welfare Commission Order 5-68 as providing that the wage benefits hitherto granted to women be granted to men?

STATUTES INVOLVED

California Labor Code section 1350.5(a) provides:

> "(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week."

The full text of section 1350.5 is appended to this petition as Appendix C.

California Labor Code section 1197.5 (Equal Pay Act) reads in pertinent part:

> "(a) No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work; . . ."

The full text of section 1197.5 is appended to this petition as Appendix D.

California Labor Code section 1199 reads in pertinent part:

> "Every employer . . . is guilty of a misdemeanor . . . who does any of the following:
>
> * * *
>
> "(e) Reduces the wages of any employee in order to comply with Section 1197.5."

The pertinent portion of Title VII, 42 U.S.C. section 2000e-2, is appended to this petition as Appendix E.

STATEMENT OF THE CASE

Homemakers, Inc., filed in the United States District Court for the Northern District of California a complaint seeking declaratory and injunctive relief under Title VII of the Civil Rights Act of 1964. The action sought to prevent the enforcement of certain California statutes and administrative orders which require an employer to compensate employees at a premium wage rate for time worked in excess of the regular work day (eight hours) or regular work week (forty hours).

Homemakers is an employer of both males and females. Admittedly, Homemakers utilizes some of its employees for more than eight hours a day and for more than forty hours a week. Admittedly, Homemakers is not paying any of its employees the required premium pay for overtime hours. The complaint alleged that Homemakers is not required to comply with

the premium overtime wage rate statute because the statute speaks only to female employees and hence is discriminatory on the basis of sex and in conflict with Title VII of the Civil Rights Act of 1964.

Petitioners-defendants are the California State agencies charged by the Legislature with the administration and enforcement of the statutes and administrative orders presently in question. Pursuant to the State Equal Pay Act, petitioner Division of Industrial Welfare has repeatedly enforced the premium overtime wage rate statute in favor of both an employer's male and female employees. The Division has recovered on behalf of both men and women thousands of dollars of unpaid, premium overtime compensation. Petitioners have consistently argued in this litigation that these statutes and orders read in the context of federal and state anti-discrimination legislation require that the premium wage rate for overtime be granted to both an employer's male and female employees.

The Equal Employment Opportunity Commission filed a brief as amicus curiae in the District Court and the Court of Appeals, urging that the Commission's interpretation of Title VII in conjunction with the Federal Equal Pay Act, 29 U.S.C. 206 (d)(1), did not require invalidation of the California statutes and orders. Rather, the Commission urged that to eliminate sex discrimination, Title VII mandated that California Labor Code section 1350.5 be read to require California employers to pay both their male and female employees the premium wage rate for overtime hours.

On plaintiff's motion for summary judgment, the District Court held that the premium overtime wage rate provisions of California Labor Code section 1350.5 and Industrial Welfare Order 5-68, section 3, were in conflict with Title VII and thus null and void. The court refused to interpret the provisions of the California Equal Pay Act or Title VII as requiring extension of the overtime pay provision to male employees.

The Court of Appeals for the Ninth Circuit affirmed the lower court's decision. The Court of Appeals was persuaded that it was not within the province of the federal courts to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions, unless that intention is clearly shown. The Court of Appeals held that the statutes and orders in question conflict with Title VII and cannot be enforced against plaintiff.

Because of the substantial interests at stake, the Court of Appeals has stayed the issuance of its mandate until final resolution of the issues presented to this Court.

REASONS JUSTIFYING ISSUANCE OF THE WRIT

I.

THE NINTH CIRCUIT'S DECISION PRESENTS A DIRECT IRRECONCILABLE CONFLICT WITH THE EIGHTH CIRCUIT'S APPLICATION OF TITLE VII.

The Court of Appeals for the Eighth Circuit, in *Hays v. Potlatch Forests, Inc.* (8th Cir. 1972) 465 F.2d 1081, addressed the issue whether an Arkansas

statute which requires employers to pay female employees time-and-a-half for all hours worked in excess of eight hours per day was in conflict with Title VII of the Civil Rights Act of 1964. The Court of Appeals recognized that:

> "Insofar as the Arkansas statute results in discrimination against men . . . [the] conflict with Title VII can be avoided by requiring Potlatch to pay its male employees the same premium overtime rate which it is compelled to pay its female employees." [Footnotes omitted.]
>
> 465 F.2d at 1082.

The Court held that:

> "There is ample support for the position that any discrimination against men resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees rather than holding it invalid. As the District Court pointed out, this position is in accord with the express policies of the Equal Pay Act, 29 U.S.C. §206(d)(1). See *Shultz v. American Can Company-Dixie Products,* 424 F.2d 356, 359 (8th Cir. 1970); *Murphy v. Miller Brewing Company,* 307 F.Supp. 829, 836-837 (E.D. Wis. 1969); 29 C.F.R. §§800.60 and 800.61; L. Kanowitz, Women and the Law, 121, 147 (1969) . . . ." [Footnotes omitted.]
>
> 465 F.2d at 1083.

The explicit holding of the Eighth Circuit is in direct, irreconcilable conflict with the instant decision of the Court of Appeals for the Ninth Circuit. The Ninth Circuit has held that California Labor Code section 1350.5, which is virtually identical to the

Arkansas overtime wage-rate statute, conflicts with Title VII and is therefore a nullity. This conflict between circuits centers on the judicial selection of remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Furthermore, the conflict centers on the complementarity between Title VII and the Federal Equal Pay Act. The Ninth Circuit refused to acknowledge the positive remedial relationship between those two federal anti-discrimination acts. The Eighth Circuit, on the other hand, acknowledged and promoted the mutual purpose of each act to eliminate sex-based, wage discrimination and to assure economic security by maintaining rather than reducing the level of employee wage benefits.

The issues in conflict between these two circuits are of critical importance to the administration and enforcement of Title VII. The Eighth and Ninth Circuits have perceived totally different alternatives for fulfilling the statutory goal of eliminating discrimination based on sex. Rather than perceiving different alternatives in differing situations, in virtually identical legal and factual settings, the two circuits have fostered directly contradictory results under Title VII. One circuit assures the elimination of sex discrimination by denying the wage benefits to both sexes. The other circuit assures the elimination of sex discrimination by requiring the wage benefits be granted to both male and female employees.

Title VII of the Civil Rights Act of 1964 grants the judiciary extensive latitude to frame appropriate relief to overcome employment discrimination:

> "[t]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."
>
> 42 U.S.C. §2000e-5(g).

In recent years, the federal judiciary has fashioned a cornucopia of affirmative remedies. Generally, these remedies have been structured to make the discriminatee whole and to remedy the effects of past discrimination. *Frontiero v. Richardson* (1973) 411 U.S. 677; *Franks v. Bowman Transportation Co.* (5th Cir. 1974) 495 F.2d 398. Federal courts have ordered affirmative recruitment programs to increase the number of minority employees. *Morrow v. Crisler* (5th Cir. 1974) 491 F.2d 1053. Hiring quotas for transition periods have been ordered to cure the present effects of past discrimination. *Vulcan Soc. of N.Y. Fire Department, Inc. v. Civil Service Comm. of the City of N.Y.* (2d Cir. 1973) 490 F.2d 387. Particularly illustrative of the use of affirmative relief is *Rosen v. Public Service Commission* (3rd Cir. 1973) 477 F.2d 90. The Third Circuit increased the pension rights of male employees to conform with those which had been provided to female employees. The Court expressly recognized that to eliminate purposefully sex discrimination, the employees of the disadvantaged sex should be brought up to the economic level of the employees of the opposite sex.

The instant conflict between the Eighth and Ninth Circuits hinges on this recognition of the affirmative

remedial purpose of Title VII. The Ninth Circuit's decision cannot be sustained without resolving the conflict. The Ninth Circuit simply abdicated the affirmative remedial function vested in the judiciary under Title VII.

In addition to the basic interpretative issue under Title VII, the Eighth and Ninth Circuits have given directly contradictory effect to the Federal Equal Pay Act, 29 U.S.C. §206. As the Eighth Circuit in *Hays v. Potlatch Forests, Inc., supra,* appreciated, the affirmative remedial dictates of Title VII are bolstered by the express policies of the Federal Equal Pay Act.[1] 465 F.2d at 1083. The Eighth Circuit found the remedial mandate of the Federal Equal Pay Act persuasive:

> ". . . an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. section 206(d)(1).

The Ninth Circuit ignored this directive of the Equal Pay Act in seeking an appropriate remedy under Title VII.

Furthermore, the Ninth Circuit ignored the California Equal Pay Act which requires the identical affirmative relief mandated under the Federal Equal Pay Act.[2] In *Hays v. Potlatch Forests, Inc., supra,*

[1]The Equal Pay Act has been consistently found significant in interpreting Title VII. See *Ammons v. Zia Company* (10th Cir. 1971) 448 F.2d 117; *Hodgson v. Brookhaven General Hospital* (5th Cir. 1970) 436 F.2d 719.

[2]California Labor Code section 1197.5 declares in pertinent part that "No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex . . ."

the Eighth Circuit did not have the benefit of such explicit state remedial legislation. Nevertheless, the Eighth Circuit was compelled to grant affirmative relief under the federal anti-discrimination laws. The Ninth Circuit, in direct contrast, also eliminated discrimination but only by eliminating the statutorily granted premium wage benefit for all employees. To remedy discrimination, the Ninth Circuit directed the employer to disregard both the state and federal equal pay prohibitions that an employer may not reduce an employee's wage rate to achieve equality. The Ninth Circuit permitted the employer to do precisely what state and federal law prohibit.

The Ninth Circuit's remedy of debilitating equalization, if permitted to stand, will undermine the enforcement efforts of those presently suffering from sex-based, wage discrimination. The disadvantaged will perceive that little or nothing can be gained by an attempt to remedy wage discrimination. In vivid contrast, the Eighth Circuit's decision promotes the fundamental purposes of Title VII—the assurance of equal opportunity for employment advantages. Petitioners respectfully submit that it is incumbent upon this Court to resolve this irreconcilable conflict between circuits in favor of the affirmative remedial purposes of Title VII.

Labor Code section 1199 provides in pertinent part that any employer shall be guilty of a misdemeanor who "(e) Reduces the wages of any employee in order to comply with Section 1197.5."

II.

THE ISSUES PRESENTED ARE OF CRITICAL ECONOMIC SIGNIFICANCE TO VAST NUMBERS OF CALIFORNIA EMPLOYEES AND TO EMPLOYEES IN OTHER STATES.

The decision of the Court of Appeals denying the enforceability of California's premium overtime wage-rate statute deprives approximately two million California female employees from receiving overtime wage benefits. Concurrently, the decision deprives even greater numbers of male employees from the statutorily-guaranteed right to equal premium overtime wage rates. Since approximately forty percent of California employees are not covered by the Federal Fair Labor Standards Act but exclusively rely upon California's premium overtime wage-rate guarantee, the aggregate economic significance of the decision is tremendous. A monetary estimate of the decision's impact is beyond calculation. But moreover, the economic impact to the individual employee and the employee's family may be dramatic. Premium overtime wages provide one of the most significant income-raising avenues available to financially desperate employees. Kanowitz, *The Equal Rights Amendment and the Overtime Illusion*, 1 N.Mex. L.R. 461, 477 (1971). The decision of the Court of Appeals barricades that avenue for a substantial number of California employees.

When originally enacted, California Labor Code sections 1350 and 1350.5 provided female and minor employees with wage benefit and working hour protections. Subsequently, the California Legislature has sought to eliminate all sex-based wage discrimination.

Amendments to the State Equal Pay Act unequivocally call for the sexually non-discriminatory extension to employees of one sex those wage rate benefits presently granted to the opposite sex. *See* Labor Code sections 1197.5, 1199(e). The decision of the Court of Appeals ignores this demonstrative State legislative intent not only to eliminate sex-based, wage discrimination but to assure equality through affirmative relief.

The issues presented in this case transcend the recognition of premium overtime wage rates for California male employees. As discussed above in Part I, Congress has vested the federal judiciary with the responsibility for the enforcement of Title VII and granted to the judiciary wide discretion to exercise affirmatively their equitable powers to fashion complete relief. 42 U.S.C. §2000e-5(g). The congressional direction for affirmative relief envisions remedies which compensate for past discrimination and which promote present economic security. *Rosen v. Public Service Elec. and Gas Co.* (3rd Cir. 1973) 477 F.2d 90. The Ninth Circuit abandoned its affirmative remedial responsibility by invalidating section 1350.5 and withdrawing substantial wage benefits relied upon by California employees. A review of the Ninth Circuit's decision raises the crucial issue of the affirmative character of the judicial remedy available under Title VII.

An additional issue of national significance is the remedial relationship between the Federal Equal Pay Act and Title VII in the elimination of sex-based,

wage discrimination. The District Court and the Court of Appeals refused to find any interpretative significance in the Equal Pay Act in fashioning a remedy under Title VII. The decision of the Court of Appeals promotes a contradictory resolution of sex-based, wage discrimination between the Equal Pay Act and Title VII. Since both Acts attack sex-based, wage discrimination, an authoritative decision on their remedial complementarity is crucial.

The Court of Appeals refers to recently enacted California legislation as indicative of a legislative intent to "cure" the existing overtime wage rate provision. Assembly Bill 478, October 1, 1973, Stats. 1973, ch. 1007. This legislation, however, does not diminish the significance of this litigation. It does not resolve the instant controversy and it will not resolve future controversies over the validity of California's premium overtime wage rate statute. Assembly Bill 478 neither amends nor repeals Labor Code section 1350.5. The bill essentially grants authority to the Industrial Welfare Commission to establish the rules and regulations necessary to provide adequate and reasonable wages, hours and working conditions for both male and female employees. *See* Labor Code section 1173. Assembly Bill 478 continues the long-standing dual guarantee of both the Commission's orders and the statutory provision for overtime wage rate benefits. The retention of section 1350.5 voices the Legislature's concern for a statutory guarantee of a premium overtime wage rate. Rather than a reflection of the Legislature's dissatisfaction with section

1350.5, Assembly Bill 478 manifests the Legislature's renewed commitment to stand behind its statutory overtime wage rate provision.

California stands with numerous other states which have sought to remedy sex-based wage discrimination through the enactment of state equal pay acts. This litigation questions the efficacy of state legislation to remedy previously enacted sexually discriminatory, wage benefit guarantees. California, a pioneer in anti-discrimination legislation, has sought to eliminate discrimination while maintaining the same high level of wage benefits for all employees. The decision of the Ninth Circuit frustrates this perceptive, remedial intent of California's Equal Pay Act. With the decision of the Ninth Circuit, the potency of each state's equal pay act is now suspect. An issue of such nationwide significance calls for an authoritative review by this Court.

III.

THE NINTH CIRCUIT'S DISREGARD OF THE EEOC'S INTERPRETATION DISREGARDS THIS COURT'S DECISION AND THE WILL OF CONGRESS.

In *Griggs v. Duke Power Company* (1971) 401 U.S. 424, this Court considered the weight to be accorded the Equal Employment Opportunity Commission's guidelines interpreting Title VII. This Court acknowledged that, "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." 401 U.S. at 434. Since the Commission's

construction complemented the Act and its legislative history, this Court acknowledged the guidelines as expressing the "will of Congress".

In the instant case, the District Court and the Court of Appeals refused to extend any degree of deference toward the relevant interpretation of the Commission.

The Commission has promulgated Guidelines on Discrimination Because of Sex. 29 C.F.R. §§1604.1-1604.10. The pertinent guideline, 29 C.F.R. §1604.2(b)(3), provides that an employer must give the same benefit of a premium wage rate for overtime to male employees that state law requires for female employees.

The Commission's guideline is remedial in character; it suggests that sex-based, wage discrimination should be resolved by raising the wage rate of the disadvantaged group. The remedy suggests no more than the implementation of Title VII in recognition of the remedial requirements of the Federal Equal Pay Act. Title VII prohibits discrimination based on sex with respect to an employee's wages. 42 U.S.C. §2000e-2. The Equal Pay Act declares that any wage rate differential shall be remedied by raising the wage rate of the disadvantaged employee. 29 U.S.C. §206(d)(1). In the field of sex-based, wage discrimination, Title VII and the Equal Pay Act are in *pari materia* and are to be construed so as to implement each other. *Shultz v. Wheaton Glass Co.* (3rd Cir. 1970) 421 F.2d 259, 266. Furthermore, Congress has mandated that the court in applying Title VII look to the Equal Pay Act to determine the existence of

sex based, wage discrimination. 42 U.S.C. §2000e-2. The Commission's guideline simply construes together the express directives of the Equal Pay Act and Title VII. The Ninth Circuit, by ignoring the Commission's guideline, ignored the Congressionally mandated, affirmative remedial relationship between the Equal Pay Act and Title VII.

The Court of Appeals attempted to justify its rejection of the guideline by reasoning that the Commission's authority does not include authority to issue "regulations" which would modify "state substantive law." However, the Commission's authority to promulgate "regulations" is not at issue. The issue is the interpretative significance to be attributed to the Commission's guidelines in effecting an appropriate remedy under Title VII. The Court refused to accord any weight to the Commission's experience in remedying sex-based, wage discrimination under Title VII. Moreover, since the guideline simply reiterates the requirements of the Equal Pay Act and Title VII, the Ninth Circuit has simply disregarded the interpretative significance of the Equal Pay Act.

If an employer were in violation of the Federal Equal Pay Act for sex-based, wage discrimination, the Act would require raising the wage rate of the disadvantaged sex to the wage rate of the favored sex. *See Hodgson v. Wheaton Glass Co.* (3rd Cir. 1971) 446 F.2d 527. Under the Act, equality of wages cannot be achieved by a lowering of a wage rate. If this same employer were charged with sex-based, wage discrimination under Title VII, the identical remedy

would obtain. *See Rosen v. Public Service Elec. and Gas Co.* (3rd Cir. 1973) 477 F.2d 90. In the instant case, the employer complains that a state statute produces sex-based, wage discrimination and that the remedy must be the elimination of wage benefits through the invalidation of the statute. The fact that a state statute is in question neither justifies nor requires the elimination of the premium wage rate to achieve the equality mandated under Title VII. If the employer had sought the invalidation of the statute under the Federal Equal Pay Act, the remedy, as required by the Act, would be to raise the wage rate of the disadvantaged sex. Wage-Hour Admin., Interpretative Bulletin 800.162. The general provisions of Title VII should not be manipulated to frustrate the clear congressional directive to provide affirmative relief for sex-based wage discrimination.

The Commission's guideline implements the remedies specified under the Equal Pay Act to sex-based, wage discrimination prosecuted under Title VII. The Ninth Circuit's refusal to consider the guideline constitutes, therefore, a refusal to consider the will of Congress. The Ninth Circuit's total disregard of congressional intent constitutes an abuse of the Federal Courts' vested responsibility for affirmative enforcement of Title VII.

In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination and to promote voluntary compliance with the requirements

of Title VII. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44. To accomplish these functions, the Commission's guidelines should not be subject to the spurious distinctions and restrictions suggested by the Ninth Circuit. A perceptive, authoritative decision by this Court is essential.

CONCLUSION

For the reasons discussed above, petitioners respectfully submit that a Writ of Certiorari should issue to review the decision of the lower court affecting significant State and Federal questions.

Dated: March 21, 1975.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 73-1786

Homemakers, Inc., of Los Angeles,
Plaintiff-Appellee,

vs.

Division of Industrial Welfare and Industrial Welfare Commission of the State of California,
Defendants-Appellants.

[December 31, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: LUMBARD,* KOELSCH and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order declaring invalid certain provisions of the California Labor Code and related orders of the California Industrial Welfare Commission requiring payment of premium overtime pay to covered women employees. The district court

*Senior Circuit Judge, United States Court of Appeals for the Second Circuit.

found that the provisions in question were in conflict with and superseded by Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e *et seq.* (1970)].[1] It also found that plaintiff's failure to comply with the California statute did not give rise to an unlawful employment practice under Title VII.

Homemakers is an employer of domestic workers and persons who care for the sick in patients' homes. It initiated this action to restrain appellant state agencies from enforcing against it those women's premium overtime pay provisions in *Cal. Labor Code* §§ 1350 and 1350.5[2] which it claimed would require

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[1]The pertinent provision of Title VII is 42 U.S.C. § 2000e-2, which reads in relevant part:

"(a) It shall be unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * * *

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

[2]Cal. Labor Code § 1350. *Maximum hours per day and week*

"No female shall be employed in any [of the designated industries], more than eight hours during any one day of 24 hours or more than 48 hours in one week, except as provided in Section 1350.5."

§ 1350.5. *Employees covered under Fair Labor Standards Act; overtime; exceptions; airline female employees*

it to discriminate in favor of women in violation of Title VII.

In response, appellants reasoned that the challenged statutes and orders presented no inevitable conflict with federal law, since Homemakers could comply readily with both federal and state requirements by extending the benefits of the premium overtime pay legislation to its male as well as to its female employees. Indeed, they argued that state and federal "equal pay" laws, *see Cal. Labor Code* § 1197.5 (1970); 29 U.S.C. § 206(d) (1970), require employers to pay both sexes at the higher overtime pay rates provided for women. Appellants relied also on Equal Employment Opportunity Commission [EEOC] guidelines which make it a violation of Title VII for an employer to refuse to hire female employees in order to avoid payment of overtime, or for an employer to fail to

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"(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week.

"(b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

provide its male employees with the same benefits required under state law for its female employees.

The district court rejected these arguments,[3] and refused to follow an Eighth Circuit decision extending the benefits of the Arkansas women's premium overtime pay statute to all employees in the state on the same grounds as those advanced by appellants.[4] In so holding, the district court also ruled that the EEOC's power to issue procedural regulations does not include authority to issue regulations which would modify state substantive law to the degree urged by appellants.[5]

Similarly, the district court found that it would be beyond its own power to interpret the challenged statutes in a way which would significantly expand the statutorily designated class of beneficiaries. Although such an interpretation might provide the consistency between the challenged statutes and federal law necessary for upholding the former it would usurp the legislative power vested exclusively in the state.[6]

Such judicial restraint appears particularly warranted in light of the legislative intent which both parties concede to underlie those portions of the state labor code of which the challenged provisions are a part. This court has previously relied on this intent (to afford special protection for women employees) in

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[3]The district court's opinion is reported at 356 F. Supp. 1111 (N.D. Calif. 1973).

[4]*See Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972).

[5]356 F. Supp. at 1113.

[6]356 F. Supp. at 1112.

invalidating other "protective" legislation in the California Labor Code as unlawfully discriminatory.[7]

We are persuaded by Judge Renfrew's historical observation that the premium overtime pay provisions of sections 1350 and 1350.5 were part and parcel of the entire body of state law seeking to provide special protection for women workers. We are also persuaded by his conclusion that it is not within the province of the federal courts to attempt to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions, unless that intention is clearly shown.[8] This is particularly true when the reading requested by appellants (to extend the premium overtime pay provisions to male workers) would impose a sizeable economic burden on employers affected by sections 1350 and 1350.5.[9]

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[7]See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (weightlifting and hours limitations on female employees); *Mengelkoch v. Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) (hours limitations). *See also Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Calif. 1972) (rest breaks only required for women); *Local 246, Utility Workers v. Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970) (weightlifting restrictions); *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) (laws forbidding women bartenders).

[8]At least one state supreme court has recently adopted this view. In *Idaho Trailer Coach Ass'n v. Brown*, 95 Idaho 910, 523 P.2d 42 (S.Ct. Idaho, 1974), the Idaho Supreme Court found that subsequent state anti-discrimination legislation had repealed that state's premium overtime pay for women law by implication. Therefore, the Idaho court did not need to consider the trial court's alternative holding that the challenged statute was also unenforceable because it was in conflict with Title VII.

[9]Moreover, it would be particularly speculative for a court to extend the benefits of the statute only to the male employees of these employers covered by the challenged provisions. To do so would seem to assume that the legislature would want the same group of

Finally, we note that the California legislature has recently enacted legislation which will cure the defects of the earlier enactments by expressly allowing the Industrial Commission to prescribe overtime premium pay rates applicable to male and female employees alike. Act of Oct. 1, 1973, Assembly Bill No. 478. Enactment of this legislation, after a similar bill had been vetoed the previous year, would seem to indicate the legislature's realization that the prior version of the overtime pay provisions inaccurately expressed, or was inadequate to express, its current policy.

We agree with the opinion of the district court, and affirm its holding that the statutes and orders in question conflict with the Civil Rights Act of 1964 and therefore cannot be enforced against plaintiff-appellee Homemakers.

Affirmed.

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industries subject to premium overtime pay requirements for all employees as had originally been selected as the foci of the maximum hours limitations for women set out in section 1350.

Appendix B

United States District Court
N.D. California

No. C-72-1864.

Homemakers, Inc., of Los Angeles,
Plaintiff,

vs.

Division of Industrial Welfare and Industrial Welfare Commission of the State of California,
Defendants.

April 2, 1973.

OPINION, ORDER AND JUDGMENT

RENFREW, District Judge.

Plaintiff, an employer of domestic workers and persons who care for the sick in patients' homes, brought this action to declare invalid certain portions of the California Labor Code and related orders of the California Industrial Welfare Commission. A preliminary injunction was sought to restrain defendants, state agencies for industrial welfare, from enforcement of the state laws in question. In addition, plaintiff has filed a motion for summary judgment.

Both motions present the same issue: Whether § 1350 and § 1350.5 of the California Labor Code and

Order 5-68 § 3 of the California Industrial Welfare Commission regulating employment and compensation of women are in conflict with Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and, if so, whether the state statutes and regulations should be declared invalid as being preempted by the federal statutes.

Section 703(a)(1) of the Civil Rights Act of 1964 states that it is an unlawful employment practice to discriminate on the basis of sex "against any individual with respect to his compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Under the California statutes challenged here, plaintiff is required to pay overtime premium only to female employees. Plaintiff has refused to pay the premium on the basis that such compliance with state law would be a violation of the federal statutes which have invalidated all women's protective laws. See Sail'er Inn v. Kirby, 5 Cal.3d 1, 9-10, 95 Cal.Rptr. 329, 485 P.2d 529 (1971); Rosenfeld v. Southern Pacific Company, 293 F.Supp. 1219, 1224 (C.D.Cal.1968), affirmed 444 F.2d 1219 (9 Cir. 1971); Mengelkoch v. Industrial Welfare Commission, 284 F.Supp. 956, 959 (C.D.Cal.1968).

The Court agrees with defendants that the Civil Rights Act of 1964 invalidates only those state statutes which are inconsistent with Title VII provisions. See 42 U.S.C. § 2000e-7 and § 2000h-4. However, the Court does not agree that the necessary consistency can be found in the state statutes by interpreting them as requiring the employer, if he chooses to have

any employees work overtime, to pay the same overtime premium to men as well as to women. Such an interpretation would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature. The Court is aware that the only authority directly on this issue is contrary. The Court has read carefully the opinion of Chief Judge Henley in Potlatch Forests v. Hays, 318 F.Supp. 1368 (E.D. Ark.1970), dealing with provisions in the Arkansas Labor Code substantially identical to those involved here. There the court extended the overtime benefits to male employees. See also the affirming opinion of the Court of Appeals for the Eighth Circuit in Hays v. Potlach Forests, Inc., 465 F.2d 1081 (8 Cir. 1972). However, this Court concludes that a federal court may not exercise the legislative power vested solely in the state legislature in order to avoid a conflict between state and federal law.

Defendants urge that extension of the benefits to male employees may be granted pursuant to "Equal Pay" laws which set no wages but require that there be no sex-based distinction in compensation (Cal. Labor Code, § 1197.5; 29 U.S.C. § 206(d), which requirement, say defendants, makes it mandatory that employers pay both sexes at whatever pay rate is higher. Such an extension of benefits to men would conflict with the legislative intent of the statutes in question. This intent, as both defendants and the Equal Employment Opportunity Commission (EEOC), as amicus curiae, have conceded in their memoranda, was to protect only working women, not

men, by supplementing women's income in an attempt to narrow the gap between the income of working women and that of men similarly employed.

To extend the benefits of the statutes to an entirely new class of beneficiaries would thus be a substantial change in legislative intent. Defendants urge the Court to make this change, however, referring to EEOC guidelines which say an employer will be adjudged in violation of Title VII if it refuses to hire female employees to avoid payment of overtime or if it fails to provide the same benefits for its male employees. 29 C.F.R. § 1604.2(b)(3) (37 Fed.Reg. 6836, April 5, 1972).

The Court agrees that great deference should be given EEOC guidelines and interpretative comments, because the EEOC is charged with the responsibility of enforcing the Civil Rights Act of 1964. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); see also United States v. City of Chicago, 400 U.S. 8, 10, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970). But the authorization given the EEOC by Congress is to issue procedural regulations. Such authority does not include regulations which would effect substantive state law to the degree urged here, namely that of adding a new class of beneficiaries to those already covered by the California statutes requiring overtime payments to women. Such a substantial change in legislative intent should be made by the legislature, not the courts. Burns v. Rohr Corp., 346 F.Supp. 994, 997 (S.D.Cal.1972); Bastardo v. Warren, 4 E.P.D. § 7635 (W.D.Wis. 1970).

While this Court may question the motives of plaintiff and sympathize with its women employees, nevertheless it refuses to exercise the legislative power which belongs solely to the California Legislature. This is particularly so where, as here, a bill which would have expressly extended to all employees the Labor Code statutes regulating working conditions of women and minors was passed by the California State Legislature in its 1972 regular session (A.B. 1710) but was vetoed by the Governor at the close of that session.

There is no question of fact remaining which would preclude an opinion on plaintiff's motion for summary judgment. The statutes and orders in question are in conflict with the Civil Rights Act of 1964 and are therefore invalid. Accordingly,

It is hereby ordered, adjudged and decreed that § 1350 and § 1350.5 of the California Labor Code and Order 5-68 § 3 of the California Industrial Welfare Commission are in conflict with and superseded by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

It is hereby further ordered, adjudged and decreed that plaintiff's failure to comply with § 1350 and § 1350.5 of the California Labor Code does not give rise to an unlawful employment practice under Title VII of the Civil Rights Act of 1964.

It is hereby further ordered, adjudged and decreed that plaintiff's motion for summary judgment is granted and that each party shall bear its respective costs herein.

Appendix C

CALIFORNIA LABOR CODE

§ 1350.5

(a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours any one day or 40 hours in any one week.

(b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

(c) The provisions of subdivisions (a) and (b) of this section shall not affect or change the provisions of any existing collective bargaining agreement.

(d) Notwithstanding the provisions of subdivision (b) of this section, the provisions of subdivision (a) of this section shall apply to the employment of females by railroads or airlines certificated by the federal or state government, except that subdivision (a) shall not apply where any such employee of such airline, except a commissary employee (1) works over 40 hours in any one week, but not more than 60 hours, where the time worked in excess of such 40 hours is due to a temporary modification in the employee's normal work schedule, not required by the employer but arranged for the convenience of the employee, including but not limited to, situations where the employee requests a change in days off or trades days off with another employee; or (2) works a four-day week of not more than 40 hours.

Appendix D

CALIFORNIA LABOR CODE

§ 1197.5 Equal wage rates for all employees; variations; enforcement

(a) No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work; provided, that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith.

(b) Any employer who violates subdivision (a) of this section is liable to the employee affected in the amount of the wages of which such employee is deprived by reason of such violation.

(c) The provisions of this section shall be administered and enforced by the Division of Industrial Welfare. After receipt of a complaint alleging a violation of this chapter, made by an employee, authorized representatives of the division shall have authority to inspect payrolls and other employment records, to compare character of work and operations in which

employees are engaged, to question such persons and to obtain such other information as is reasonably necessary in the enforcement of this section. If the division finds that an employer has violated Section 1197.5, it may supervise the payment of any sums found to be due and unpaid to employees under subdivision (a) of this section. Acceptance of payment of sum or sums made by an employer and approved by the division shall constitute a waiver on the part of the employee of his cause of action under subdivision (g) of this section.

(d) Every employer of male and female employees shall maintain records of the wages and wage rates, job classifications and other terms and conditions of employment of the persons employed by him. All such records shall be kept on file for a period of two years.

(e) Any affected employee may register with the Division of Industrial Welfare a complaint that the wages paid to him are less than the wages to which he is entitled under subdivision (a) of this section. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to such employees.

(f) The department or division may, with the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid wages under subdivision (a) of this section, and in addition to such wages shall be entitled to recover costs of suit. The consent of any employee to the bringing of any such action shall constitute a waiver on the part of the employee of his cause of action under subdivision (g)

unless such action is dismissed without prejudice by the department or the division.

(g) Any employee receiving less than the wage to which he is entitled under this section may recover in a civil action the balance of such wages, together with the costs of suit, notwithstanding any agreement to work for a lesser wage.

(h) The burden of proof in any civil action shall be upon the person bringing the claim to establish that the differentiation in rate of pay is based upon the factor of sex and not upon other differences, factor or factors.

(i) A civil action to recover wages under subdivision (a) of this section may be commenced no later than two years after the cause of action occurs, if the employee does not have knowledge of such violation, and not later than 180 days after the cause of action occurs if the employee has knowledge of such violation.

Appendix E

CIVIL RIGHTS ACT OF 1964

The pertinent provision of Title VII is 42 U.S.C. § 2000e-2, which reads in relevant part:

> "(a) It shall be unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * * *
>
> "(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE; CALIFORNIA INDUSTRIAL WELFARE COMMISSION,
Petitioners,

VS.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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In the

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OCTOBER TERM, 1974

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE; CALIFORNIA INDUSTRIAL WELFARE COMMISSION,
Petitioners,

vs.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

QUESTION PRESENTED

The question presented for review is whether the District Court was correct in rendering, and the Court of Appeals for the Ninth Circuit was correct in affirming, a declaratory judgment that the portions of the California Women's Protective Laws requiring special overtime pay for women are invalid by reason of being in conflict with the Civil Rights Act of 1964.

STATUTES AND ORDER INVOLVED

The principal statutory provisions are Sections 1350 and 1350.5 of the California Labor Code, in Division 2

("Employment Regulation and Supervision"), Part 4 ("Women and Minors"), Chapter 3 ("Working Hours"), Article 1 ("Female Employees").

Section 1350 generally prohibits females to be employed more than eight hours during any day or forty-eight hours in any week, except as provided in Section 1350.5. The latter section in general declares female employees covered by the federal Fair Labor Standards Act may be employed up to ten hours during a day or up to fifty-eight hours in one week, provided they are compensated at one and one-half times the regular rate of pay for the excess over eight hours per day or forty per week.

The administrative order in question is Industrial Welfare Commission Order 5-68, entitled "Wages, Hours, and Working Conditions for Women and Minors in the Public Housekeeping Industry." It defines as "employee" any employed woman or minor. Section 3 thereof prohibits employment of any woman more than eight hours per day or more than five days per week unless paid one and one-half times the regular rate of pay for the excess on the sixth day. This order recites it was adopted pursuant to above provisions of Part 4 ("Women and Minors").

The Civil Rights Act of 1964 makes unlawful employment practices which, *inter alia*, discriminate, or limit, segregate or classify employees adversely, because of sex. (86 Stat. 109, 42 U.S.C.A. § 2000e-2.)

State laws, generally, may not require or permit an unlawful employment practice and may be invalid if inconsistent with any purposes or provision of the Act. (78 Stat. 262, 268, 42 U.S.C.A. §§ 2000e-7, 2000h-4.)

STATEMENT OF THE CASE

Respondent was threatened by petitioners with enforcement of state statutory and regulatory provisions respect-

ing hours and conditions of work for females and, believing them to be invalid, commenced this action in the United States District Court for the Northern District of California to secure a judgment of their validity or invalidity. Respondent's motion was granted by the Court on the determination that the statutes and orders were in conflict with the Civil Rights Act of 1964 and, therefore, invalid.

Plaintiff is an employer as that term is used in the Act and supplies the services of its employees in the homes or other premises of its customers. The services rendered are, for the most part, those required by persons who are sick or incapacitated or involve domestic work. The nature and location of the employment results in difficult record-keeping problems respecting hours and wages, often involving complicated questions of fact, which, however, were not raised in this proceeding.

Petitioners are the state agencies responsible for the administration and enforcement of the state laws brought in question regulating women's hours of work and compensation.

The most significant portion of these laws purports to require California employees to pay women employees at special premium rates as a condition of the State's permission to them to work more than the maximum hours otherwise imposed by the State.

ARGUMENT

Summary of Argument

The determination of the District Court and the Ninth Circuit that these California Women's Protective Laws are invalid as being in conflict with the Civil Rights Act of 1964 is clearly correct. The writ requested should not be granted because, in addition to this, the single decision assertedly in conflict is subject to being distinguished. Inde-

pendently of this, no momentous legal issues are present and the practical effect of the decision is limited. The actual importance of the entire question was lessened in the course of the litigation when the California Legislature eliminated a major portion of the sex-based distinctions. This significant development will, petitioners and respondent agree, obviate the conflict between the state and the federal laws adjudged to exist by the courts below.

I. The Practical Effects of the Judgment Are Limited.

The actual, practical effects of the judgment are of far less moment and consequence than petitioners suggest to the Court.

Their arguments leave the impression that this judgment would eliminate payment of premium overtime compensation in California to women (and, maybe, even men). This is not true.

In the first place, many arrangements for such premium pay are based upon private agreement of employer and employee without the intervention of governmental mandate. Others, of course, result from collective bargaining agreements. Neither type, needless to say, must follow the laws here in question in being sexually slanted and, indeed, if they did, they would be subject to invalidation under the Civil Rights Act.

Most importantly, premium pay for overtime work will continue by virtue of the requirements of the Fair Labor Standards Act. This federal law generally prescribes payment at the rate of time and one-half for work in excess of the familiar 40-hour week. It is significant, respondent believes, to what extent petitioners ignore the impact of this important law, particularly, as they stated below, since it covers about four out of five nonsupervisory employees.

Petitioners no doubt seek to avoid this because the federal law applies equally to men and women and, also, because its pervasive application in California refutes petitioners' assertions of harsh and disruptive results in the State if this women's protective law joins the others in being declared invalid.

The elimination of the three provisions in question will be beneficial and accord with national policy and, indeed, that of the State.

Section 1350 of the California Labor Code is concededly invalid,[1] and the sole statutory requirement of overtime for women is found in Section 1350.5. It, of course, has similarly been adjudged invalid by the courts below. By its own terms, this section applies only to employees covered by the Fair Labor Standards Act. As a practical matter, therefore, the loss of Section 1350.5 is hardly momentous, since the very persons covered by it are covered by the overtime provisions of the federal law.

The final provision in question, the Order of the Industrial Welfare Commission, applies to employees not covered by Section 1350.5 and, therefore, to employees not covered by the Fair Labor Standards Act. Since the California Legislature has subsequent to the commencement of this litigation amended the Commission's statutory authority and duty from that of regulating the working conditions of women and minors to that of all employees, of both sexes, its orders will hereafter comport completely with the congressional statement of national policy in

---

1. *Rosenfeld v. Southern Pacific Co.* (9th Cir. 1968) 444 F.2d 1219. Following this decision, the Division, petitioner herein, announced it would no longer enforce the maximum hours limitations in sections 1350 and 1350.5 of the Labor Code and section 3 of the Commission's orders. These are the identical sections which were challenged in the present action.

applying equally to the sexes without the sexual distinction previously prescribed.

As a result of this, a denial of the petition will leave California law exactly where it should be: male and female employees will be treated equally with respect to overtime under both the Fair Labor Standards Act and, where that is inapplicable, under the Orders of the Industrial Welfare Commission.

Petitioners' claims as to the "critical importance" of this decision are certainly overblown for another fundamental reason. It is clear California is going out of the business of "protecting" women in this fashion. Previously, other decisions of the federal courts in California have declared invalid other aspects of the California Women's Protective Law. On the aspect of it presently before the Court, the combination of this decision as it now stands and the substantial amendment of the law by the California Legislature would seem to make this rather clear. So, it may be said this case has "assumed such an isolated significance" that it would hardly bring to the Court the substantial questions which would be appropriately cognizable under the discretionary writ sought. See *Rice v. Sioux City Memorial Park Cemetery* (1955) 349 U.S. 70, 76, 75 S.Ct. 614, 618. With the day of the Women's Protective Law so definitely over, scores of such laws either having been repealed or declared invalid by the courts or the enforcing agencies of the states themselves, this type of case arguably verges on the academic or episodic. *Id.* at 349 U.S. 74, 75 S.Ct. 616.

While it is not believed this case is technically mooted, the very substantial accomplishments of the California Legislature in eliminating sexual distinctions in the State's statutory scheme certainly would support a denial of the writ on the basis the question now is obviously of a much

lesser public importance. See *District of Columbia v. Sweeney* (1940) 310 U.S. 631, 60 S.Ct. 1082.[2]

Finally, the comparatively narrow scope of the State overtime laws is apparent when viewed in terms of the coverage in California of the federal overtime law: the latter limits the State provisions' application as a practical matter to daily overtime during the first 40 hours of each work week; thereafter, the federal law simply takes over and the State provisions may be regarded as redundant.

II. The Decision Assertedly in Conflict May Be Distinguished.

Petitioners' heavy emphasis upon an asserted conflict between the opinion of the Ninth Circuit and that of the Eighth Circuit in *Hays v. Potlatch Forests, Inc.* (8th Cir. 1972) 465 F.2d 1081, is understandable and, in fact, if one were limited to the statement of the latter as set forth in petitioners' petition, the conflict might well be regarded as direct and irreconcilable, as petitioners assert. However, a reading of the actual opinions reveals significant differences which readily and properly permit the allegedly conflicting decision to be distinguished.

The Court of Appeals, in the first place, expressly refused in *Hays* to consider the important issue that the overtime laws before it were intended to limit the hours women could work and, thus, constituted a discrimination against them. (465 F.2d at 1082.) The reason stated for this was that the question was not raised below. Here, the argument has been presented and, indeed, greatly emphasized that the California overtime provisions are part and parcel of a statutory scheme of imposing maximum hours upon

2. Petitioners apparently agree, having represented to the Court of Appeals that the legislative amendments "will undoubtedly obviate the 'conflict' between federal and state laws found to exist by the District Court." (Appellants' Reply Brief, p. 2.)

women and, under settled authority, are invalid for that reason.

Secondly, the employer in *Hays* was paying overtime to both male and female employees. (318 F.Supp. 1368 at 1370, 465 F.2d at 1083.) By contrast, no such finding was made below and, indeed, petitioners flatly assert to the contrary that no premium pay was given for overtime hours at all. (Petition, p. 4.) While the accuracy of petitioners' statement may be questioned, they certainly will not object to it being accepted at face value, and doing this results in significantly different factual situations in the two cases.

Another distinguishing factor was that the employer in *Hays* had conceded it must pay the same overtime to males as it did to females. Respondent need not disagree with this general statement in suggesting it was determinative there and not even present as an issue here. Not only had it been agreed the employer already was paying overtime to females pursuant to the Arkansas statute, but the judgment of the court and what the employer was in fact already doing were remarkably similar. Understandably, therefore, and in the words of the District Court, "granting the validity of plaintiff's concession," which the judge was moved to remark had been made by the employer "presumably advisedly," the court simply found no basis to grant the relief sought by the employer in commencing the action.

Opinions are necessarily to be read in connection with the facts to determine whether there is. indeed, a conflict. *White v. Aronson* (1937) 302 U.S. 16, 58 S.Ct. 95. If the propriety of the decisions assertedly in conflict depend upon facts, issues or circumstances peculiar to only one of the two cases, there is no real conflict. Certainly, if two decisions are capable of being harmonized or distinguished, there is not the "real and embarrassing conflict" required

for issuance of this writ. *Layne & Co. v. Western Well Works* (1923) 261 U.S. 387, 393, 43 S.Ct. 422, 423.

A principal contention of petitioners is that the remedy employed in *Hays* was proper, but that the disinclination of the courts in California to apply the same "remedy" was not. Analytically, this hardly supports their argument that there is a conflict, since if there is anything flexible and peculiarly subject to individual variation, it is remedies. Further, the particular facts stipulated or found must be regarded in deciding the propriety of the specific action taken by a court.

III. The Decision Is Clearly Correct.

A. The Equal Pay Act Cannot Be Used to Perpetuate Women's Protective Laws.

The invalidity of these women's protective laws as written has been virtually conceded by petitioners, but they would save them, despite their otherwise clear and irreconcilable conflict with the Civil Rights Act, through a judicial revision of startling scope and consequence: where the laws speak of "women", petitioners would simply have them read "men and women". This, the District Court refused to do, and the Ninth Circuit affirmed the correctness of that refusal.

The "extension of the benefit" theory, which petitioners believe should be followed to accomplish this turnabout, cannot properly be utilized where its consequence, as here, is not only to ignore, but indeed, to reverse the undoubted legislative intent.[3]

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3. The Attorney General previously, respondent believes, had a clearer view of the intent and effect of these laws, and they are set forth in two published opinions of the Attorney General. In the first, it is explained that since it is for the benefit of the health and welfare of women they not be employed too long, the Legislature can absolutely limit employment of women to a specified number of

The inappropriateness of rewriting the California laws was clear to the courts below, and a reiteration of the arguments concerning them would necessarily involve a detailed reargument of the merits. Respondent will avoid this, but will briefly respond to the new emphasis by petitioners on the Equal Pay Act, made as supposed support for this device and this desired result.

That the resolution of a serious and substantial legal issue is not dependent upon the granting of this petition is illustrated by the fact petitioners seem to limit themselves to raising but one real question of law and, then, at one and the same time, describe a factual situation which makes it inapplicable.

The inapplicable issue, interesting in the abstract as it may be, is the relationship of the Equal Pay Act to the Civil Rights Act, Title VII (Petition, pp. 10-11). The factual context the petitioners present to the Court is that previously alluded to, namely, the non-payment of any overtime to any employees (Petition, p. 4). Whatever may

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hours *or can require payment of overtime premium pay to women in order to keep down the number of hours work.* 12 Ops. Cal. Atty. Gen. 319 (12/17/48). This protective intent and the all-too-accurate assessment of overtime laws as an important method of limiting maximum hours of work permitted to women was directed at California's general statutory and regulatory scheme, including Labor Code Section 1350 and the orders of the Commission.

In his second opinion, the Attorney General has stated the legislative intent in enacting Labor Code Section 1350.5 as being to broaden employment opportunities of women by permitting them to work longer hours. 50 Ops. Cal. Atty. Gen. 141, 143 (12/21/67). This concession is very probably correct, but it is, at the same time, fatal to any defense of the state law's validity because the federal law simply does not permit the states to arrogate to themselves the right so to grant or withhold employment opportunity to that portion of their population which is female.

While it is evident the Attorney General is capable of change, the laws before the Court are the same described above. "[T]he passage of time cannot change clear and unequivocal language of a statute." *Monte Vista Lodge v. Guardian Life Ins. Co. of America* (9th Cir. 1967) 384 F.2d 126, 128.

be said about either the merits of such a practice or the accuracy of the petitioners' assertion, their statement of the case clearly makes the Equal Pay Act quite inapplicable here.

Since the Equal Pay Act Law only mandates equality of pay, and by itself does not require payment at any special rate or, of course, payment of overtime, where the employer does not pay overtime as prescribed by a state women's protective law requiring overtime, the only compulsion of law for overtime would be the women's protective law. It is, of course, basic to respondent's position that such a provision is invalid and, furthermore, that the spirit and purpose of the Equal Pay Law itself, just as is true of Title VII, is affronted by State sex-based wage laws. The policy of the two federal laws being the same, it is submitted the Equal Pay Law will not save sexually discriminatory state protective laws where the Civil Rights Act would require they be invalidated.[4]

In sum, petitioners' statement is that respondent is *not* "paying a wage rate differential" and they do not, therefore, assert there is either any violation of the Equal Pay Act or any prohibited reduction of wages in order to cure that nonexistent violation. Consequently, the Act is simply not relevant to the sole question of whether the California Women's Protective Law conflicts with Title VII.

As some part of this non-issue of the Equal Pay Act, petitioners perceive yet further conflict in the appropriateness of the remedies available and utilized under Title VII.

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4. It hardly need be belabored that Congress spoke of "paying a wage rate differential" based on sex (77 Stat. 56, 29 U.S.C.A. § 206d), nor that the law has nothing to address itself to if different payments are not made to the two sexes for equal work. In the specific area of overtime payment, the regulations are abundantly clear that there can be no prohibited discrimination unless one of the sexes is paid something the other is not (29 F.R. 5548, § 800.162).

Petitioners' position is they would not have selected the "remedy" of the Ninth Circuit, which was to affirm the invalidity of the California Women's Protective Law.

It is perfectly true, and hardly necessary to cite any great number of cases as authority, that the federal courts have broad remedies open to them in the implementation and enforcement of the Civil Rights Act. The injunctive and other equitable relief authorized under Title VII, however, is appropriate where the courts find a prohibited employment practice by an employer (or a union). Here, of course, agencies of the State of California, once again, have been found to be administering laws which conflict and are superseded by the Civil Rights Act. When that fundamental is apprehended, the appropriateness of the result coming from the two courts below is quite clear. Certainly, the courts' "plenary and broad remedial powers" were to secure compliance with Title VII and not, as the State would have it here, perpetuate a statutory scheme of employment practices based on sexual classifications. See *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44, 94 S.Ct. 1011.

B. The EEOC's Views Were Neither Disregarded nor Controlling.

The EEOC now believes *some* women's protective laws, including, as it happens, the ones here in question, should be read to apply to men, and this having been done, that they should not be regarded as invalid.

The opinion of each court below expressly commented on the Commission's guidelines. They were, therefore, not disregarded as petitioner suggests, but merely found wanting as persuasive authority requiring the modification of state substantive law as urged by petitioners. (Petition, pp. iv, x.)

Petitioners complain that the District Court and the Court of Appeals were not sufficiently deferential to the views of the Equal Employment Opportunity Commission. (Cf. Judgment, Petition, p. x ["The Court agrees that great deference should be given EEOC guidelines and interpretive comments . . ."].) The thinking of the Commission and its staff should certainly be considered, but it clearly is not controlling on the courts.

To be sure, courts commonly express their "deference" for administrative interpretations of governing statutes. Indeed, this Court has done so in connection with this statute and this commission. *Griggs v. Duke Power Company* (1971) 401 U.S. 424, 91 S.Ct. 849, *Espinoza v. Farah* (1974) 414 U.S. 86, 93-95, 94 S.Ct. 334, 339-340.

It is important, however, to recognize that the courts qualify or condition such statements, and in suitable instances reject what they regard as erroneous actions by the agencies involved. Thus, in *Griggs,* the Court strongly qualified its statement by limiting it to where the Act and its legislative history support the Commission.

In *Espinoza,* after noting the reversal of position by the EEOC in its guidelines, the Court declared, "The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference [citations], but that deference must have limits, where, as here, application of the guideline would be inconsistent with an obvious congressional intent . . . Courts need not defer to an administrative construction of a statute when there are 'compelling indications that it is wrong.' " 414 U.S. at 94, 94 S.Ct. at 339.

The correct rule, it would seem, is that the agency's regulations will be followed when they are correct and will not be when they are incorrect. It is respondent's contention,

of course, that in adopting the guidelines in question, the Commission acted contrary to the legislative intent and purpose, was inconsistent even with its own previous actions and, in a word, was wrong.

A further and fundamental reason why the Commission's interpretive regulations should not be considered binding is found in the authorizing statute itself, where Congress limited the Commission's authority to "suitable *procedural* regulations to carry out the provisions of the sub-chapter." 78 Stat. 265, 42 U.S.C.A. § 2000(e)12(a) (emphasis added).

C. Women's Protective Laws Conflict With the Provisions and Purposes of the Civil Rights Act of 1964.

That the decision is clearly correct necessarily involves at least brief reference to the merits argued and decided below.

National policy prohibits sexual discrimination in employment, and this is true whether it be required or permitted under a state law or an unlawful employment practice of an employer. That this policy contrasts sharply with that accepted but a relatively few years ago undoubtedly accounts for the fact that women's protective laws have been brought before the courts in substantial number, with the general result that they have been found to exhibit as a common characteristic and rationale sexual distinctions in employment practices now proscribed by Title VII.

The general policy, if not in the context of the specific question here involved, has been enunciated by this Court. See *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, *Stanton v. Stanton* (1975) ..... U.S. ....., 95 S.Ct. 1373. The highest court in California has strongly declared this policy. *Sail'er Inn, Inc. v. Kirby* (1971) 5 C.3d 1, 10, 95 Cal. Rptr. 329, 334 [". . . tender and chivalrous concern

for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women"]. Respondent submits this statement, and the actions of the California Legislature in eliminating gender-based distinctions in the State law, more accurately represent the policy of the State than that suggested in the petition.

The federal courts sitting in California have with great consistency adhered to the national policy expressed in Title VII. Indeed, this petition is but a continuing effort by petitioners which would, if eventually successful, unsettle much of the law developed in these various decisions. See *Rosenfeld v. Southern Pacific Co.* (1968) 444 F.2d 1219, *Local 246, Util. Wkrs. U. v. Southern California Edison Company* (1970) 320 F.Supp. 1262, *Schaeffer v. San Diego Yellow Cabs, Inc.* (1972) 462 F.2d 1002, *Burns v. Rohr Corp.* (1972) 346 F.Supp. 994.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated: May 15, 1975.

PHILIP J. GREGORY
GARRISON, GREGORY, HERNDON & TOWNSEND
Attorney for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE, ET AL., PETITIONERS

v.

HOMEMAKERS, INC., OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed pursuant to the Court's invitation of June 9, 1975.

QUESTION PRESENTED

Whether certain California statutes and regulations which require that covered employers pay premium overtime wages to female employees, but are silent as to compensation of male overtime workers, conflict with Section 703(a) of Title VII of the fed-

eral Civil Rights Act of 1964, which prohibits sex-based discrimination in employment.

STATEMENT

This is an action brought by Homemakers, Inc., a California corporation which employs both men and women to work as domestic laborers and to care for the sick in the patients' homes. Faced with threatened enforcement by the California Division of Industrial Welfare [1] of state statutes and regulations requiring that employers pay premium "time and a half" wages for overtime work by female employees, Homemakers brought suit in the United States District Court for the Northern District of California for declaratory and injunctive relief, alleging that, since the state statutes and regulations impose no similar duty to pay premium wages to male employees who work overtime, they are invalid because in conflict with the prohibition of sex-based discrimination in employment contained in Section 703(a) of Title VII of the 1964 Civil Rights Act, 78 Stat. 255, 42 U.S.C. 2000e–2(a).[2]

[1] The Division of Industrial Welfare of the California Department of Industrial Relations enforces the regulations promulgated by the Industrial Welfare Commission, an autonomous body within the Division. In an audit of Homemakers' records for the period January 1971 through June 1972, the Division determined that Homemakers had failed to pay $18,785 in premium overtime wages to 208 female employees. See the State's brief on appeal at 3 (a copy of which we are lodging with the Clerk of this Court).

[2] Section 703(a) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *."

At the time of suit, the Industrial Welfare Commission was empowered generally to regulate the wages, hours, and working conditions of female employees "in any occupation, trade, or industry" in the State.[3] In the exercise of these powers it had promulgated Order 5–68, which set maximum hours and rates of overtime pay for female employees in the "Public Housekeeping Industry."[4]

The statutory scheme includes, in addition to regulations promulgated by the Commission, specific maximum hour and overtime wage provisions in Sections 1350 and 1350.5. The former limits the maximum hours that women employed in certain industries may work, except as allowed by the latter. Section 1350.5, the coverage of which is generally co-extensive with the coverage of the federal Fair Labor Standards Act,[5] provides that covered women employees may be employed up to ten hours per day or 50 hours per week, provided that they are paid time and a half wages for hours worked beyond eight daily or 40 weekly. The hour limitations contained in both sections have been struck down as inconsistent with

[3] See Sections 1171–1204 of the California Labor Code (West 1971), applicable at the time of suit only to women and minors, but amended before the court of appeals' decision to include adult male employees as well. The effect of the amendment on this case is discussed at pp. 14–15, *infra*.

[4] The Order is reproduced in full at Exhibit B of the State's brief on appeal. We are advised by the Division of Industrial Welfare that the Commission has promulgated thirteen other orders with similar overtime provisions covering different industries. Presumably they stand or fall with Order 5–68 and the statutes at issue here.

[5] See Pet. App. C, and pp. 13–14, *infra*.

Title VII.[6] The result is that Section 1350 is of no effect whatever, and that the inconsistency with federal law that Homemakers alleges arises solely from Section 1350.5's requirement that covered employers pay premium wages to female employees who work overtime. Although to our knowledge the maximum hour limitations of Order 5–68 have not explicitly been invalidated by judicial decree, it is our understanding that the State does not assert their validity and that, as with Section 1350.5, only the overtime wage provisions of the Order are contested.[7]

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[6] *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219, 1225–1226 (C.A. 9); *Mengelkoch* v. *Industrial Welfare Comm'n*, No. 66–1618–ALS, decided December 9, 1971 (C.D. Calif.), on remand from *id.*, 442 F.2d 1119 (C.A. 9).

[7] Although Homemakers states (see its brief on appeal, a copy of which we are lodging with the Clerk of this Court, at 28) that the enforcement action threatened against it was to be based principally on the provisions of the Order, we are informed by the Division of Industrial Welfare that they intended to enforce the provisions of Section 1350.5 against Homemakers, and that the Order, which applies "except as otherwise provided by statute," is inapplicable given Homemakers' coverage by Section 1350.5.

Homemakers has not, in this case, contested the applicability of Section 1350.5, although in a pending case in the Sixth Circuit, *Homemakers Home and Health Care Services, Inc.* v. *Carden*, No. 74–1680, Homemakers has sought a declaratory judgment that it is not subject to the Fair Labor Standards Act. Since exemption under that law would apparently make Section 1350.5 inapplicable (see Pet. App. C), if Homemakers prevails in that case on grounds that apply also to the California corporation, then Homemakers would be subject only to the Order of the Industrial Welfare Commission. On the other hand, if Homemakers is subject to the Fair Labor Standards Act, its challenge to the state law here would not affect its obligation to comply with the federal Act's overtime wage requirements.

The district court granted summary judgment for Homemakers (Pet. App. B), rejecting the State's argument (*id.* at viii–ix) that "the necessary consistency" between the state and federal laws "can be found in the state statutes by interpreting them as requiring the employer, if he chooses to have any employees work overtime, to pay the same overtime premium to men as well as to women." Even though the Eighth Circuit had recently accepted a similar argument in *Hays* v. *Potlatch Forests, Inc.*, 465 F. 2d 1081, such an interpretation, said the court (*id.* at ix), "would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature * * * [and] that a federal court may not exercise * * * in order to avoid a conflict between state and federal law."

The district court also rejected the Commission's argument (*ibid*) that federal and state "Equal Pay" laws require that Homemakers equalize any discrepancy between the overtime wages paid to women and to men by raising the lower wage to the higher—*i.e.*, by paying men premium overtime wages—rather than by reducing all wages to the lowest paid, which the statutes forbid.[8] The court ruled (*id.* at x) that this would "extend the benefits of the [state] statutes

[8] Section 3 of the federal Equal Pay Act of 1963, 77 Stat. 56, amending Section 6 of the Fair Labor Standards Act of 1938, 52 Stat. 1062, as amended, 29 U.S.C. 206, provides: "No employer having employees subject to any provisions of this section shall discriminate * * * between employees on the basis of sex by paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs * * * requir[ing] equal skill * * *, except [for valid, nonsex-related reasons]: *Provided*, That an employer

to an entirely new class of beneficiaries [and] would thus be a substantial change in legislative intent * * * [which] should be made by the legislature, not the courts." Finally, the district court noted (*id.* at xi) in support of its decision that a bill which would have extended the coverage of the state labor laws relating to women and minors to all employees had recently failed of enactment.

The court of appeals affirmed (Pet. App. A), explicitly approving the district court's refusal to interpret the state statutes as mandating premium overtime pay to male employees. "Such judicial restraint," said the court (*id.* at iv–v), "appears particularly warranted" since the legislative intent behind the challenged laws—"to afford special protection for women employees"—had been relied on by the court "in invalidating other 'protective' legislation in the California Labor Code as unlawfully discriminatory," and "it is not within the province of the federal courts to attempt to determine how far, if at all, subsequent state legislation has shown an intent to redirect the original focus of the premium pay provisions * * *" (footnote omitted).

The court of appeals also noted (*id.* at vi) that a

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who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Although Homemakers might have claimed that the state laws were inconsistent with the Equal Pay Act as well as with Title VII, it did not do so. The Equal Pay Act would apply, of course, only if Homemakers were subject to the Fair Labor Standards Act. See note 7, *supra*.

The state Equal Pay Act is set forth at Pet. App. D.

new state law (discussed *infra*) had been enacted since the district court had rendered its decision, extending the state labor laws relating to women and minors to men, and empowering the Industrial Welfare Commission to prescribe premium overtime pay for men and women alike. Although the district court had considered its decision supported by the previous failure of this bill, the court of appeals apparently deemed its passage also to warrant judgment for Homemakers.

DISCUSSION

The fate of women's "protective" laws since passage of the Civil Rights Act of 1964 has been the subject of considerable controversy.[9] In many cases protective laws which had the effect of restricting women's access to the employment market, either directly (as by limiting the number of hours they could work or the types of jobs they could hold) or indirectly (as by inducing employers not to hire women because it would be simpler or cheaper to hire men), have been struck down as inconsistent with Title VII.[10] Although in some cases employers could have complied with these state laws, without violating Title VII, by also treating men the way the statutes required women to be treated, as a practical matter some of the restrictions could not feasibly be applied to male employees as well (as, for example, where maximum hour limitations were impractical).

[9] See Note, "*Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*," 59 Cornell L. Rev. 133 (1973).

[10] See, *e.g.*, *id.* at 135, 146–149 (and cases cited therein).

Other protective laws, however, such as minimum wage and premium overtime pay provisions, which are of easier practical application to men as well as women, have been found to be reconcilable with the antidiscrimination provisions of Title VII: since the employer is not forbidden by state law to pay the minimum wage or premium overtime to male employees, he can comply with the state protective law by affording the prescribed benefits to women and with the federal law's injunction against sex-based discrimination by affording them to men as well.[11]

We agree with the State that the court of appeals erred in striking down the state laws under the Supremacy Clause, and that its decision is essentially in conflict with that of another court of appeals. While the record in this case does not fully reveal the likely impact of this decision in the State of California or its potential effect on the development of the law in this area, we nonetheless believe that the State's petition should be granted [12] and the judgment should be reversed.

1. It is well settled that a state law should be struck down for inconsistency with a federal statute "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " *Kelly* v. *Washington,* 302 U.S. 1, 10 (citing numerous authorities). Where, as

[11] See, *e.g.*, *id.* at 141–146.

[12] We note that, although petitioner has invoked this Court's certiorari jurisdiction, review by way of appeal under 28 U.S.C. 1254(2) might have been sought instead.

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here, Congress has not occupied the field to the exclusion of the states' regulatory powers,[13] "the proper approach" in cases where conflict is alleged "is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (quoting from *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357). Thus, unless Section 1350.5, or Order 5–68, "in terms or in its practical administration, conflicts with [Title VII], or plainly and palpably infringes its policy" (*Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766), the court of appeals should not have held these laws invalid.

In our view, Section 1350.5 and Order 5–68 are not incompatible with Section 703(a) of Title VII. Both state provisions require covered employers to pay overtime wages to women at one-and-a-half

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[13] Two provisions of the Civil Rights Act of 1964 expressly affirm the right of the states to retain or enact laws on the same subject. Section 708 of Title VII, 42 U.S.C. 2000e–7 provides: "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

And Section 1104 of Title XI, 42 U.S.C. 2000h–4 provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

The Fair Labor Standards Act, which includes the Equal Pay Act, contains a provision to similar effect. See 29 U.S.C. 218(a).

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times their regular rate of pay. They do not require or prohibit payment of such wages to men. Neither Title VII nor the Equal Pay Act prescribes actual rates of pay; both insist, in broad terms, that men and women be paid the same rate for the same work. Thus an employer can, in compliance with state law, pay overtime to women, and, without offense to state law and in compliance with federal law, pay the same overtime to men.

Indeed, the federal Equal Pay Act, which prohibits sex discrimination with respect to wages, provides that——

> an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee [29 U.S.C. 206(d)(1)].

Accordingly, a regulation of the Wage and Hour Administrator of the Department of Labor, the agency which administers the Equal Pay Act, states that employers who are required by state law to pay female employees premium overtime must, under federal law, pay similar overtime to male employees performing equal work.[14]

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[14] This regulation, 29 C.F.R. 800.162, provides:

"§ 800.162—*Overtime payments required by state law* [:]

"The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a state law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would

As regards wages, Title VII and the federal Equal Pay Act are in *pari materia* and are to be construed to complement each other, *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (C.A. 3), certiorari denied, 398 U.S. 905. Read together, the two statutes evidence a dual congressional objective—(1) to eliminate sex-based wage discrimination; and (2) to promote the economic security of employees by requiring that, in equalizing their pay, the employer raise the wages of those paid less rather than lowering the wages of those paid more. Accordingly, the Equal Employment Opportunity Commission, the agency which administers and interprets Title VII, has taken the position in interpretative regulations that Title VII does not conflict with state overtime laws for women, but requires that such benefits be paid also to men.[15]

It thus has been the consistent position of the agencies administering both federal statutes in this

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be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women."

[15] The regulation, 29 C.F.R. 1604.2, provides in pertinent part:

"§ 1604.2 *Sex as a bona fide occupational qualification.*

"(b) Effect of sex-oriented State employment legislation.

* * * * * * *

"(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

"(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

"(ii) It does not provide the same benefits for male employees."

field that state laws like those at issue here do not conflict with federal law and policy, but merely trigger the operation of the federal law. At least where, as here, no showing has been made that the state laws at issue operate to discourage employers from hiring women,[16] such laws should not be struck down under the Supremacy Clause.

Contrary to the view of the court of appeals (and apparently of petitioner as well), there is no need here, in order to save the state laws, to extend their overtime pay benefits to men as well as women. No more need be held in this case than that Section 1350.5 and Order 5–68 do not, by requiring premium overtime wages for women, conflict with federal law. Any obligation thereafter faced by employers to pay such wages to men will arise under the federal law. Thus the court's fear that it would trench on the prerogatives of the state legislature by construing a state statute to reach beyond its terms was unfounded.[17]

2. In *Hays* v. *Potlach Forests, Inc.*, 465 F.2d 1081, the Eighth Circuit upheld an Arkansas statute requiring premium overtime pay for women against a challenge, like that brought by Homemakers here, that it

[16] Discriminatory hiring practices to avoid the effect of such laws would, of course, violate Title VII. See n. 2, *supra*.

[17] We do not believe that the mere fact that the remedy for women would be that afforded by state law, while that for men would be the federal remedy, rises to the level of an equal protection violation, so long as both remedies are adequate and effective. But cf. *Austin* v. *New Hampshire*, 420 U.S. 656; *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337.

was in conflict with Title VII and the federal Equal Pay Act. The court held, first, that the state statute was not necessarily inconsistent with Title VII because it "'does not say that women must be paid more than men; it simply says that they must be paid daily overtime without making a similar requirement as to men' " (465 F. 2d at 1082); and, second, that "any discrimination against men resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees * * *" (*id.* at 1083).

In our view the court went further than necessary in reaching the latter conclusion, since it need have found no more than that the state requirement to pay women "time and a half" did not conflict with the federal requirements of equal treatment. Indeed, the employer in *Hays* had "been paying its male employees, as well as its female employees, the same premium overtime rate" and "conceded that the anti-sex discrimination provisions of Title VII will compel it to continue doing so" if the Arkansas statute were upheld (as it was). *Id.* at 1083. That, we submit, was a sufficient basis in itself for the result reached in *Hays*. Although the court in *Hays* chose to ground its decision on a construction of the Arkansas law, that law was virtually indistinguishable from those at issue here and the decision conflicts, in result, with that of the court below.

3. We find nothing in the record on which to base an accurate estimate of the number of employees potentially affected by the court of appeals' decision in the present case. Given the largely co-extensive coverage of the Fair Labor Standards Act (which

contains overtime provisions) and Section 1350.5,[18] the employees in California who look exclusively to state law for overtime wage protection are those covered by the orders of the Industrial Welfare Commission. We are advised by the California Division of Industrial Welfare that, out of a total workforce (excluding supervisory and government personnel) of about 6,137,000, the number of such employees, both male and female, amounts to some 2,316,000.[19]

As Homemakers points out (Brief for Respondent at 4), some of these employees may be assured of premium overtime pay by virtue of private agreement with their employers, although such agreements will no longer be backed by force of law if the decision below stands.

Shortly before the court of appeals' decision in this case California enacted Assembly Bill No. 478, which extends to men most of the general statutory provisions as to minimum wages and working conditions previously applicable only to women. The act apparently has no effect on Section 1350.5, however, and we understand that its legislative history con-

[18] Section 1350.5 differs from the overtime provisions of the Fair Labor Standards Act in that it provides for daily overtime payments, whereas the federal Act mandates premium overtime only after an employee has worked more than a certain number of hours in a week. Section 1350.5 and the federal Act also differ in coverage in that the former exempts all employers of employees exempted under the latter as of February 1, 1967. Changes in the federal law since then have not been mirrored in the state law.

[19] In its motion for stay pending appeal, Whitlow affidavit at 3 (we are lodging a copy with the Clerk of this Court), the state represented that "at least 800,000 women employees are dependent exclusively upon state regulations for such protection from exploitation as they currently enjoy."

tains no reference to that statute. The new act also empowers the Industrial Welfare Commission to regulate wages and conditions of employment with respect to the entire workforce, not just women and minors (although it does not automatically confer on men the benefits of the Commission's previously passed orders, such as Order 5–68: new action by the Commission, which apparently has not yet been taken, will be necessary to have this effect).

The passage of Assembly Bill No. 478 does not render this case moot, since Homemakers' past and future obligations under the stricken state laws are still in issue. But in the court of appeals the state said that the act "has momentous impact upon the issues of this lawsuit" and "will undoubtedly obviate the 'conflict' between federal and state laws found to exist by the District Court."[20] In short given the Commission's ability now to regulate overtime pay for both men and women, the decision of the court of appeals need cause no lasting interference with state labor law policy.

4. We believe, nevertheless, that certiorari should be granted because of the continuing importance of the conflict between the decision below and that in *Hays* in reconciling federal and state law in this area. In addition to California and Arkansas, several other states have premium overtime wage statutes or other "protective" provisions applicable only to women.[21]

[20] See the State Reply Brief on appeal at 2 (we are lodging a copy with the Clerk of this Court). The full text of Assembly Bill No. 478 also appears therein.

[21] According to the Women's Bureau of the Employment Stand-

Employers and employees in all of these states are in need of guidance as to the continuing validity of such laws and the obligations they trigger under federal law.

CONCLUSION

For the foregoing reasons, the United States believes that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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ards Administration, U.S. Department of Labor, Colorado, Idaho, Texas, Wisconsin, and Wyoming have such overtime laws. Colorado, Utah and Wisconsin have minimum wage provisions for women only, and Kansas and Louisiana provide for minimum wage orders for women, although none is now in effect. In addition, numerous states have meal period, rest period, seating requirement, or other protective laws applicable only to women.